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No. 99-243

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1999

SCOT L. ZIMMERMAN,

Petitioner,

v.

STATE OF OREGON DEPARTMENT OF JUSTICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Title I of the Americans With Disabilities Act prohibits discrimination in private and governmental employment based on disability and provides redress against the employer in federal court after exhausting administrative remedies. Title II of the ADA prohibits public entities from engaging in certain conduct based on a person's disability and provides redress directly in federal court. Title II does not expressly mention employment discrimination among the types of conduct prohibited, nor does it expressly require injured parties to exhaust administrative remedies before bringing suit in federal court.

The question presented is: Did Congress intend that employment discrimination claims could be brought against a state employer under Title II, thereby avoiding Title I's exhaustion requirements.

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS WHY THE PETITION SHOULD BE DENIED

I. Introduction

Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") prohibits discrimination in employment based on an employee's disability. Title I allows an employee who has been the subject of discrimination to sue the employer, including a government employer, but only after the employee has exhausted available administrative remedies. 42 U.S.C. § 12117(a).

Title II of the ADA, 42 U.S.C. § 12131 *et seq.* and § 12132 in particular, prohibits a public entity from excluding from participation in or denying the benefits of its services, programs or activities or subjecting to discrimination any "qualified individual with a disability." Title II does not expressly require that a disabled person claiming to have been excluded from or denied participation in a service, program or activity, or to have been subjected to discrimination, exhaust any administrative remedies before suing the public entity in federal court.

While Title I expressly prohibits employment discrimination by a public entity, two federal circuit courts are split on whether Title II also prohibits public entities from engaging in employment discrimination. Only one federal circuit court—the Ninth Circuit—has analyzed this interpretive question by painstakingly examining the actual language of Titles I and II. Concluding that the language was plain and unambiguous, the Ninth Circuit also became the first federal circuit court to conclude that Title II does not address discrimination in government employment and does not, therefore, provide a federal remedy for that discrimination.

Although a split exists among the circuits, that split is as yet narrow, may well be short-lived, and is relatively superficial in any event. To date, the split involves only two circuit courts. Although four other circuit courts have assumed Title II covers employment discrimination, they have not been called upon actually to decide the question. The State believes that there is at least a reasonable probability that other circuit courts, when called upon to decide the question, will side with the Ninth Circuit's well-reasoned and thoughtful resolution of the question. Meanwhile, the disagreement over Title II's coverage need not cause any person subjected to disability-based discrimination by a government employer to be deprived of a federal remedy in light of Title I's remedial provisions.

Should this court grant certiorari, the State intends to raise several arguments in defense of the result reached by the Ninth Circuit that were not raised or considered specifically below. Principal among them is that in enacting the ADA, Congress lacked the power to abrogate states' 11th Amendment immunity from suit in federal court. Moreover, the State will assert that even if Title II were ambiguous about covering government-employment claims and subjecting States to suit in federal court for those claims, the "plain statement" rule mandates that these questions be resolved in favor of the States. Finally, the State will assert that *Chevron* deference[1] is inappropriate when the effect of granting deference to an agency's interpretation of a federal statute is to subject States to suit in federal court. In other words, as with the "plain statement" rule, Congress can only curtail states' conduct and

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[1] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (stating that when Congress ambiguously expresses its intent, the court will uphold administrative regulations construing the statute unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute").

subject them to damages actions in federal court when Congress has clearly and unambiguously expressed that intent in the statute.

The State respectfully submits that because the split in the circuits has just arisen, may only be temporary and in any event is not terribly consequential at this point in view of the availability of Title I claims, granting certiorari now would be premature and inappropriate. Moreover, this case is not the appropriate vehicle to address whether Title II covers public-entity-employment discrimination because issues that may be key to resolving that question were not raised or considered below.

II. The split in the circuits is narrow, may well resolve itself and in any event is relatively superficial.

Prior to the Ninth Circuit's decision in *Zimmerman v. State of Oregon Department of Justice*, 170 F.3d 1169, *reh. en banc* denied 183 F.3d 1161 (9th Cir. 1999), the only circuit court to consider the question of Title II's applicability to employment discrimination claims was the Eleventh Circuit in *Bledsoe v. Palm Beach County Soil & Water Conservation District,* 133 F.3d 816, *reh. en banc denied,* 140 F.3d 1044 (11th Cir. 1998), *cert. denied* 119 S.Ct. 72 (1998). Although other circuits have applied Title II in the employment discrimination context, they have done so because the question of its applicability had not been raised.

- In *Holmes v. Texas A&M University,* 145 F.3d 681 (5th Cir. 1998), plaintiff sued the university under Title II of the ADA, contending that he had been terminated due to disability. The university succeeded in the district court in defeating plaintiff's claim on statute of limitations grounds. The Fifth Circuit assumed without deciding that Title II applied, but agreed with the

district court that plaintiff had failed to bring his claim timely.

- In *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995), plaintiff—a neurosurgical resident who had tested positive for HIV—sued the university hospital under Title II and section 504 of the Rehabilitation Act, 29 U.S.C. § 794, after his surgical privileges were terminated. The Fourth Circuit assumed that Title II applied to plaintiff's employment discrimination claim, but agreed with the district court that plaintiff had not demonstrated that he was a "qualified individual with a disability" entitled to relief.

- In *Castellano v. City of New York*, 142 F.3d 58 (2nd Cir. 1998), disabled retirees sued under Titles I and II of the ADA and section 504 of the Rehabilitation Act claiming discrimination in the provision of retirement benefits. The court assumed that most claims could be brought under all three statutes, then rejected them because plaintiffs had failed to show that they had been discriminated against because of a disability. 142 F.3d at 70.

- Most recently, in *Davoll v. Webb*, 1999 WL 969263 (10th Cir. 1999), disabled, retired, Denver police officers sued under Titles I and II of the ADA, contesting the city's policy forbidding disabled police officers from transferring into other vacant positions in city government. The court noted the disagreement between the Ninth and Eleventh Circuits over the question of Title II's applicability to an employment discrimination claim. The court declined to resolve the question for the Tenth Circuit inasmuch as the city had

only raised the issue for the first time in a memorandum of supplemental authorities citing *Zimmerman*.

That other circuit courts have assumed, without deciding, that Title II extends to employment-discrimination claims should not enhance the gravity of or widen the narrow divide that now exists among the circuits. Indeed, prior to *Zimmerman*, the Ninth Circuit itself had assumed that Title II applied in the employment context. *See Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1270 (1998) (assuming "without discussion" the applicability of Title II to an employment claim.) Now that the Ninth Circuit has addressed the issue and has rejected the Eleventh Circuit's analysis in *Bledsoe*, litigants in other circuits likely will call upon their courts to address the issue as well. And the State believes a reasonable likelihood exists that, like the Ninth Circuit, these courts also will find unpersuasive the Eleventh Circuit's legal analysis.

In *Zimmerman*, the Ninth Circuit explained how, based on the text of Titles I and II, Congress had expressed unambiguously its intent that disability-based employment discrimination claims be brought only under Title I and not Title II. In *Bledsoe*, the Eleventh Circuit purported to conduct a "statutory language" analysis, but in reality, the court's conclusion was driven by two factors: 1) its view of the legislative history as reflecting Congress' intent that Title II covers employment, and 2) its deference to the Department of Justices' regulations interpreting Title II to cover claims of employment discrimination. 133 F.3d at 822. Two assumptions thus permeate *Bledsoe*'s analysis: first, that the task is simply to discern Congress' intent; and second that the *Chevron* principle of deferring to the DOJ regulations is helpful—perhaps even dispositive—in discerning that intent.

Even if one were not persuaded by the Ninth Circuit's conclusion that Congress had clearly expressed its intent that employment claims be reserved to Title I, the ambiguity, if any, in the language does not advance the contrary conclusion. With all due respect to the Eleventh Circuit, the State submits that reliance on legislative history and agency regulations is inappropriate in resolving the issue of congressional intent that is presented here. The question is whether, in enacting Title II, Congress intended to prohibit governmental entities, including States, from engaging in certain conduct—specifically, disability-based employment discrimination—and to subject those public bodies to suit for damages in federal court. That is not an ordinary legislative intent question. Answering that question in the affirmative considerably encroaches on and erodes state sovereignty, particularly if, as *Bledsoe* at least intimates, Title I's administrative exhaustion requirements do not apply to an action brought under Title II and some or all defenses available under Title I also do not apply.

The Eleventh Circuit failed to heed this Court's insistence that Congress must express its intent clearly and unmistakably when it seeks to intrude on areas of state and governmental sovereignty. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 467–70 (1991) (refusing to interpret ADEA to cover state-appointed judges absent a "plain statement" that judges were covered). Moreover, the court wrongly assumed without analysis that deference to DOJ's regulations under *Chevron* was appropriate in deciding the extent to which Congress intended to intrude into or reduce state sovereignty. *Chevron* deference is subservient to the principle, embedded in the Tenth Amendment, that while the States have conferred on Congress the power in many instances to encroach on state sovereignty, Congress must announce clearly and expressly its intent when it seeks to exercise that power. Tenth Amend-

ment concerns that Congress be candid and unambiguous about its intentions so that States are on notice are not allayed one iota if Congress' latent intent can be effectuated via agency regulations promulgated beneath the radar of state scrutiny and state influence.

The State respectfully submits that the Eleventh Circuit's undue reliance on legislative history and DOJ's interpretive regulations makes its conclusion that Title II covers public-entity-employment discrimination highly suspect. Once lower courts realize that legal problems abound in the Eleventh Circuit's analysis, what appears now to be a conflict in the circuits may well disappear.

The State further submits that the split is of little consequence in terms of depriving a deserving plaintiff of an adequate federal remedy. Title I of the ADA unquestionably was drafted to cover disability-based employment discrimination, including discrimination by government employers. Setting to one side for the moment the Eleventh Amendment question, the circuit split on the reach of Title II in and of itself will, therefore, not deprive any government employee of a federal remedy for disability-based discrimination. No suggestion has been made that Title I does not provide a full remedy for such discrimination claims. The persons likely not to avail themselves of Title I's provisions are those who either failed to exhaust its remedies and for whom those remedies are no longer available, or those who desire to rush directly to federal court with their money damages claims, contrary to the carefully thought out, administrative, remedial scheme that Congress provided for in Title I. In short, no one with a disability-related employment-discrimination claim necessarily has to be adversely affected because of a disagreement among the circuits over whether Title II prohibits employment discrimination.

Moreover, it is even unclear at this point whether persons who have failed to exhaust their administrative remedies and are therefore foreclosed from a Title I remedy would be able to file under Title II. *See Holmes*, 145 F.3d at 684 ("We decline to consider the difficult issue of whether exhaustion of administrative remedies with the EEOC is required under Title II of the ADA, a matter moot to the resolution of this appeal.") Indeed, other circuits faced with Title II claims have borrowed liberally from Title I's requirements. *See, e.g., Doe v. University of Maryland Medical System Corp.*, 50 F.3d at 1265 (applying definitions from Title I to claim of discrimination under Title II, which has its own definitions); *Davoll v. Webb*, 1999 WL 969263, *7–9 (applying Title I definition of "qualified individual with a disability" in Title II context, even though Title II has its own definition; concluding that plaintiffs have a duty to "initiate the interactive process envisioned by the ADA," which process is mandated by EEOC regulations adopted to implement Title I, not Title II). If persons can only file claims under Title II provided they first comply with Title I's requirements, the question of Title II's availability becomes a moot point for most government employees and certainly all state employees.

III. To resolve the interpretive question presented here may require the Court to address several issues neither briefed nor decided below.

Even assuming that this Court were not satisfied with the Ninth Circuit's conclusion that Congress clearly expressed its intent in Titles I and II that employment-discrimination claims be limited to Title I, the Court's work would only have begun. First, the State would intend to argue that, as discussed above, the "plain statement" rule applies because the issue is whether Congress acted in Title II not only to limit government action but to subject governmental entities, including States, to suit

directly in federal court.[2] Second, the State would intend to argue that part two of the *Chevron* test does not apply in this context because the effect of interpreting Title II to cover employment discrimination is to lessen state-sovereign powers and subject States to suits in federal courts without their consent. The State would argue that *Chevron* deference is inappropriate if the "plain statement" rule applies. That is, for Congress to impose requirements on the States that private parties may enforce directly in federal court, Congress must say it clearly and unambiguously. If Congress has been ambiguous about its intent, no federal agency, exercising delegated rule-making powers, can "clarify" that which Congress itself failed to do.

Third, the State would intend to argue that Zimmerman's claim under Title II is barred because, as the district court found, Zimmerman failed to exhaust his administrative remedies. Thus, this Court may have to resolve whether Title I's exhaustion requirements nevertheless apply to claims brought under Title II, a question noted but not addressed in *Holmes*.

The final looming issue not briefed or addressed below, but that this Court will be asked to address should it grant certiorari, is the Eleventh Amendment question: whether Congress exceeded its authority to enforce the Fourteenth Amendment when it purportedly abrogated States' immunity from suits under Title II. The importance of the issue and the fact none of the parties in this case briefed the issue below strongly suggest that unless the present case is the only one

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[2] The State submits that this and other arguments that it did not specifically raise below would be properly before the Court because they are fairly subsumed within the question presented in the petition and are alternative bases to uphold the judgment below. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 475, n. 6 (1970) (stating basic rule that the prevailing party may rely on any ground in support of the judgment below, even if not relied upon or considered by the court below).

available to address the issue, the Court should await a more appropriate opportunity.

CONCLUSION

No urgency demands that this Court resolve the question of whether Title II of the ADA covers disability-based employment discrimination. The issue so far divides only two circuit courts; it may, with time and thoughtful consideration by the lower courts cease to be an issue; and, in any event, in the grand scheme of things, it is an issue that is of relatively minimal significance. Even assuming the Court deems the issue to be significant, this case is an inappropriate one to resolve it. The petition for writ of certiorari should be denied.

Respectfully submitted,
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